United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-7145

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BISWANATH HALDER,
Plaintiff-Appellant,
v.
SPERRY RAND CORPORATION,
Defendant-Appellee.

76-7145

BISWANATH HALDER,
Plaintiff-Appellant,
v.
QUOTRON SYSTEMS, INC.,
Defendant-Appellee.

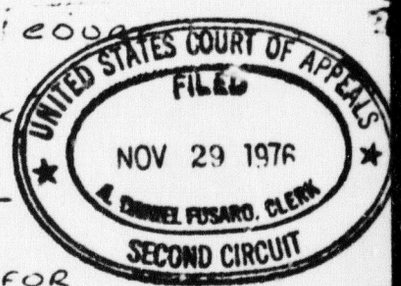
76-7146

BISWANATH HALDER,
Plaintiff-Appellant,
v.
INFORMATICS, INC. & EQUIMATICS, INC.,
Defendants-Appellees.

76-7147

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK



PETITION FOR REHEARING WITH A REQUEST FOR

REHEARING EN BANC

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PETITION FOR REHEARING WITH A REQUEST FOR REHEARING EN BANC

PLAINTIFF-APPELLANT BISWANATH HALDER HEREBY PETITIONS THE COURT FOR A REHEARING WITH A REQUEST FOR A REHEARING EN BANC OF ITS DECISION ENTERED ON NOVEMBER 15, 1976 IN THIS MATTER, INSOFAR AS IT AFFIRMS THE DISTRICT COURT'S DENIAL OF COMPELLING THE APPELLEES TO DISCLOSE THE QUALIFICATIONS OF THE PROGRAMMERS AND ANALYSTS HIRED BY THEM SINCE 1969, AND ALSO THE DISTRICT COURT'S AWARD OF ATTORNEYS' FEES AGAINST THE APPELLANT. ON THE GROUND THAT THIS COURT'S HOLDING IS BASED UPON ERRONEOUS INTERPRETATION OF THE FACTS.

FACTS

THE APPELLANT WAS BORN IN INDIA, OF INDIAN PARENTAGE. HE HOLDS A BACHELOR'S DEGREE IN ELECTRICAL ENGINEERING FROM THE UNIVERSITY OF CALCUTTA. HE IMMIGRATED TO THIS GREAT COUNTRY ON MAY 31, 1969.

PRIOR TO COMING TO THE UNITED STATES, HE HAD GAINED TWO YEARS OF EXPERIENCE IN COMPUTER SOFTWARE WITH TWO REPUTABLE COMPUTER MANUFACTURERS IN ENGLAND. HE WAS ADMITTED TO THIS COUNTRY AS AN ALIEN WHO IS A MEMBER OF A PROFESSION FOR WHICH THERE IS AN AVAILABLE MARKET FOR HIS PROFESSIONAL SERVICES. 8 USCA 1153 (a)(3).

EVER SINCE THE APPELLANT ARRIVED IN THE LAND OF OPPORTUNITY, HE HAS BEEN LOOKING FOR A JOB.

ARGUMENT

SINCE THE APPELLANT IMMIGRATED TO THE UNITED STATES, HE CAME ACROSS INNUMERABLE ADVERTISEMENTS BY THE APPELLEES SEEKING TO RECRUIT COMPUTER PROGRAMMERS AND ANALYSTS. HE HAS RESPONDED TO SOME OF THOSE ADVERTISEMENTS. AND ALTHOUGH HIS BACKGROUND — TRAINING IN ELECTRICAL ENGINEERING AND EXPERIENCE IN ASSEMBLY LANGUAGE PROGRAMMING — PERFECTLY MATCHED A GREAT MANY OF THE APPELLEES' JOB REQUIREMENTS OVER THE LAST SEVEN YEARS, HE HAS NEVER BEEN OFFERED A JOB. IN THESE CIRCUMSTANCES, IT IS IMPERATIVE THAT THE APPELLANT BE GIVEN A FULL AND FAIR OPPORTUNITY TO AVAIL OF HIS GUARANTEED RIGHT IN A COURT OF LAW, NOT ONLY TO REDRESS HIS OWN INJURY, BUT ALSO TO VINDICATE "THE IMPORTANT CONGRESSIONAL POLICY AGAINST DISCRIMINATORY EMPLOYMENT PRACTICES." ALEXANDER V GARDNER-DENVER COMPANY, 1974, 415 U.S. 36, 45. 94 S.Ct. 1011, 1018.

POINT I THE COURT ERRED IN AFFIRMING THE DISTRICT COURT'S DENIAL OF DISCOVERY TO THE APPELLANT

THE INFORMATION SOUGHT BY THE APPELLANT THROUGH INTERROGATORIES PRIMARILY CALLS FOR THE QUALIFICATIONS OF THE PROGRAMMERS AND ANALYSTS HIRED BY THE APPELLEES SINCE 1969. YET, THE APPELLEES REFUSED TO DISCLOSE THE INFORMATION ON GROUNDS OF BURDENSOMENESS, OPPRESSIVENESS, AND IRRELEVANCE. AND THE TRIAL COURT SUSTAINED THESE OBJECTIONS ON THE GROUND THAT THE INFORMATION SOUGHT WOULD HAVE LIMITED PROBATIVE VALUE ON THE APPELLANT'S CASE.

NOTWITHSTANDING THESE OBJECTIONS, SPERRY RAND, PURSUANT TO RULE 33(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, MADE AN OFFER TO THE APPELLANT TO COME DOWN TO ITS EXECUTIVE OFFICES, AND EXAMINE AND COPY THE EMPLOYMENT APPLICATIONS AND RELATED RECORDS LOCATED AT THE SAID ADDRESS. THE APPELLANT CATEGORICALLY REJECTED THAT OFFER BECAUSE SPERRY

RAND HAS NO COMPUTER PROGRAMMER AT ITS EXECUTIVE OFFICES. THEREFORE, THAT OFFER MADE BY SPERRY RAND IS MERELY A GESTURE WITHOUT SUBSTANCE, MORE IN THE NATURE OF A EYEWASH THAN ANYTHING ELSE.

IT IS WELL ESTABLISHED THAT THE "DISCOVERY RULES ARE TO BE ACCORDED A BROAD AND LIBERAL TREATMENT," AND THAT "MUTUAL KNOWLEDGE OF ALL THE RELEVANT FACTS GATHERED BY BOTH PARTIES IS ESSENTIAL TO PROPER LITIGATION." HICKMAN V TAYLOR, 1947, 329 U.S. 495, 507, 67 S.Ct. 385, 392.

MOREOVER, THE NECESSITY FOR LIBERAL DISCOVERY TO CLARIFY THE COMPLEX ISSUES ENCOUNTERED IN LITIGATION SEEKING TO REDRESS EMPLOYMENT DISCRIMINATION HAS BEEN WIDELY RECOGNIZED. BURNS V THIOKOL CHEMICAL CORPORATION, 483 F.2d 300, CA 5 1973; MCDONNELL DOUGLAS CORPORATION V GREEN, 1973, 411 U.S. 792, 804-7, 93 S.Ct. 1817, 1825-7.

THEREFORE, THE APPELLANT DEMANDS REVERSAL

OF THE INSTANT APPEAL, AND A FAIR TRIAL UPON FULL AND COMPLETE DISCLOSURE OF THE QUALIFICATIONS OF ALL THE PROGRAMMERS AND ANALYSTS HIRED BY THE APPELLEES OVER THE PAST SEVEN YEARS.

POINT II THE COURT ERRED IN AFFIRMING THE DISTRICT COURT'S AWARD OF ATTORNEYS' FEES AGAINST THE APPELLANT

THE APPELLANT HAS BEEN SEEKING EMPLOYMENT WITH QUOTRON SYSTEMS EVER SINCE HE IMMIGRATED TO THE UNITED STATES. AND ALTHOUGH HIS BACKGROUND — TRAINING IN ELECTRICAL ENGINEERING WITH SPECIALIZATION IN LINE COMMUNICATIONS AND ELECTRONICS, AND STRONG ASSEMBLY LANGUAGE EXPERIENCE WITH MINI-COMPUTERS (EXHIBIT U OF APPELLANT'S REPLY BRIEF) — PERFECTLY MATCHED QUOTRON'S JOB REQUIREMENTS (EXHIBITS A THROUGH T OF APPELLANT'S REPLY BRIEF), HE HAS NEVER BEEN CONSIDERED FOR A JOB (AMENDED COMPLAINT, PAGES 2,3 & 4, PARA 6). YET THE TRIAL COURT AWARDED QUOTRON SYSTEMS ATTORNEYS' FEES ON THE GROUND THAT THE APPELLANT'S CLAIM BORDERS MALICIOUS PROSECUTION.

IN AMERICAN JURISPRUDENCE, THE TRADITIONAL RULE HAS BEEN THAT ATTORNEYS' FEES ARE NOT

RECOVERABLE AS COSTS. RUNYON V MCCRARY, 1976, U.S. , , 96 S.CT. 2586, 2601. HOWEVER, "WHAT CONGRESS HAS DONE, . . . WHILE FULLY RECOGNIZING AND ACCEPTING THE GENERAL RULE, IS ITSELF TO MAKE SPECIFIC AND EXPLICIT PROVISIONS FOR THE ALLOWANCE OF ATTORNEYS' FEES UNDER SELECTED STATUTES GRANTING OR PROTECTING VARIOUS FEDERAL RIGHTS." ALYESKA PIPELINE SERVICE COMPANY V WILDERNESS SOCIETY, 1975, 421 U.S. 240, 260, 95 S.CT. 1612, 1623.

THE ATTORNEY'S FEES PROVISION OF TITLE VII WAS DESIGNED TO ENCOURAGE PRIVATE ENFORCEMENT OF THE ACT AND TO REMOVE FINANCIAL OBSTACLES FROM THE PATH OF PRIVATE LITIGANTS OF LIMITED MEANS WHO COULD NOT OTHERWISE AFFORD TO PURSUE THEIR GUARANTEED RIGHTS. SEE 110 CONG. REC. 12724 (1964) (REMARKS OF SEN. HUMPHREY). SEE ALSO ATTORNEY'S FEES IN PUBLIC INTEREST LITIGATION, 48 N.Y.U.L. REV. 301 (1973); AWARDS OF ATTORNEY'S FEES TO LEGAL AID OFFICES, 87 HARV. L. REV. 411 (1973); ALLOWANCE OF ATTORNEY FEES IN CIVIL RIGHTS LITIGATION, 41 U. CIN. L. REV. 405 (1972).

CONSEQUENTLY, VARIOUS CIRCUITS HAVE HELD THAT THE SUCCESSFUL PLAINTIFF IN A JOB BIAS ACTION SHOULD ORDINARILY RECOVER ATTORNEYS' FEES, BECAUSE ACTING AS A PRIVATE ATTORNEY GENERAL, NOT ONLY HAS THE PLAINTIFF ENSURED OF THE PROPER FUNCTIONING OF THE AMERICAN SYSTEM OF GOVERNMENT, BUT ALSO HAS ADVANCED AND PROTECTED IN A VERY CONCRETE MANNER THE SUBSTANTIAL PUBLIC INTEREST. PARHAM V SOUTHWESTERN BELL TELEPHONE COMPANY, 433 F.2D 421, 429-30, CA 8 1970; LEA V CONE MILLS CORPORATION, 438 F.2D 86, 88, CA 4 1971; SCHAEFFER V SAN DIEGO YELLOW CABS, 462 F.2D 1002, 1008, CA 9 1972; BRITO V ZIA COMPANY, 478 F.2D 1200, 1204, CA 10 1973; JOHNSON V GEORGIA HIGHWAY EXPRESS, 488 F.2D 714, 716, CA 5 1974; EVANS V SHERATON PARK HOTEL, 503 F.2D 177, 186, CA DC 1974; SINGER V MAHONING COUNTY BOARD OF MENTAL RETARDATION, 519 F.2D 748, 749, CA 6 1975; EEOC V ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL NO. 638 OF U.A., SLIP OPINION 5629, 5651, CA 2 09-07-1976.

ON THE CONTRARY, AN AWARD OF ATTORNEYS' FEES TO SUCCESSFUL DEFENDANTS IN DISCRIMINATION SUITS MIGHT EFFECTIVELY DISCOURAGE SUITS IN ALL BUT THE CLEAREST CASES, AND INHIBIT EARNEST ADVOCACY ON UNDECIDED ISSUES. US STEEL CORPORATION V UNITED STATES, 519 F.2d 359, 364-5, CA 3 1975; WRIGHT V STONE CONTAINER CORPORATION, 524 F.2d 1058, 1064, CA 8 1975.

CONCLUSION

THE COURT SHOULD GRANT A REHEARING EN BANC, AND UPON REHEARING SHOULD REVERSE THE DISTRICT COURT'S DISMISSAL OF PLAINTIFF-APPELLANT'S COMPLAINT, AND GIVE THE APPELLANT A FULL AND FAIR OPPORTUNITY TO DEMONSTRATE BY COMPETENT EVIDENCE THAT THE PRESUMPTIVELY VALID REASONS FOR THE REJECTIONS OF HIS NUMEROUS EMPLOYMENT APPLICATIONS BY THE APPELLEES WERE IN FACT PRETEXTUAL OR A COVER-UP FOR A DISCRIMINATORY DECISION.

RESPECTFULLY SUBMITTED,

Biswanath Halder
Plaintiff-Appellant Pro Se
173-17 65 AVENUE
FLUSHING, NEW YORK 11365

DATED: Queens, New York
November 23, 1976

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING APPELLANT'S PETITION FOR REHEARING WITH A REQUEST FOR REHEARING EN BANC HAVE BEEN MAILED THIS DAY, POSTAGE PREPAID, TO THE FOLLOWING COUNSEL :

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Bienvenido Nieves
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DATED : Queens, New York
November 29, 1976